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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TIM DUPREE et al., Plaintiffs and Appellants, v. SAJAHTERA, INC. et al., Defendants and Respondents.	B260615 (Los Angeles County Super. Ct. No. BC463162)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, J. Stephen Czuleger, Judge**.** Affirmed in part, reversed in part, and remanded with instructions.

Henning Ruiz, Rob Hennig and Brandon Ruiz for Plaintiffs and Appellants.

Stokes Wagner Hunt Maretz & Terrell, Peter B. Maretz and Shirley Banner Gauvin for defendants and Respondents.

INTRODUCTION

Plaintiffs and appellants Tim Dupree, Nino O'Brien, and Wendy Giron (plaintiffs) appeal from the judgment entered against them following a jury verdict in favor of defendants and respondents Roberto del Hoyo and Sajahtera, Inc. (defendants), as well as the posttrial orders denying their renewed motion for a terminating sanction and awarding trial court costs. According to plaintiffs, the trial court abused its discretion when it excluded from evidence an investigative report prepared by defendants' attorney concerning the allegations of plaintiffs' complaint. Plaintiffs further contend that the trial court abused its discretion when it denied their posttrial renewed motion for a terminating sanction. And, plaintiffs contend that the cost award against them must be reversed under recent Supreme Court authority limiting the availability of cost awards to prevailing defendants in FEHA[1] actions.

We hold that the trial court's exclusion of the investigative report was not an abuse of discretion and, in any event, plaintiffs have not demonstrated that they were prejudiced by the exclusion order. We further hold that the trial court did not abuse its discretion in denying the renewed motion for a terminating sanction. And, we reverse the order awarding costs against plaintiffs and remand the issue of costs to the trial court for a determination of the amount of costs, if any, to award against plaintiff Giron.

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[1] California Fair Employment and Housing Act, Government Code section 12900 et seq.

FACTUAL BACKGROUND[2]

Defendant Sajahtera, Inc. owned and operated the Beverly Hills Hotel (the hotel)[3] and the Dorchester Collection owned Sajahtera, Inc. Individual defendant del Hoya was the hotel's general manager during the period in which plaintiffs' claims arose; he retired at the end of May 2011, around the time the hotel was apprised of plaintiffs' claims. Edward Mady was the regional director of the Dorchester Collection who reported to its chief executive officer, Christopher Cowdray. Mady replaced del Hoyo as the hotel's general manager.

Peter Fischer was an employment attorney who was retained by the hotel at Mady's recommendation to investigate the allegations in plaintiffs' complaint. He summarized the results of his investigation in a written report (the so-called Fischer report) that he provided to the hotel's management.

Plaintiff Dupree was the hotel's director of sales. He was discharged from that position in December 2010, allegedly because del Hoyo was having a sexual relationship with one of Dupree's subordinates, Rachel Eskoff, with whom Dupree had workplace conflicts. Plaintiff O'Brien began work at the hotel in the Polo Lounge as a wine captain in 2008. He held that position or a similar one through the time of trial, but claimed he was the victim of unlawful discrimination and harassment by del Hoyo and others. Plaintiff Giron worked for the hotel in the Polo Lounge as a hostess. She resigned in February 2010, allegedly because del Hoyo touched her inappropriately on a "constant" basis during her employment at the Polo Lounge.

Darlene Adams was the hotel's director of sales and marketing. Ava White was the hotel's director of human resources. Janet Jacobs was the hotel's director of finance.

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[2] Because our disposition of the three contentions raised by plaintiffs does not require a detailed review of the trial evidence, we set forth only a summary of pertinent facts to provide context for the discussion that follows.

[3] As noted above, the individual and corporate defendants will be referred to collectively as defendants. Defendant Sajahtera, Inc., dba the Beverly Hills Hotel, will be referred to separately as the hotel.

All three women were terminated in June 2011 following the investigation into the allegations of plaintiffs' complaint. Plaintiffs accused each of those former hotel managerial employees of destroying evidence soon after the hotel was advised of plaintiffs' claims. Wendy Schnee was an executive assistant to the hotel's general managers, including del Hoyo, from 1994 to 2001, when she became the director of public relations. She was also terminated in June 2011 following the investigation into plaintiffs' allegations.

Micah Paloff worked at the hotel, first as head bartender, and later as the food and beverage manager and director of operations for the Polo Lounge from 2006 until he was terminated in June 2011. He was plaintiff O'Brien's immediate supervisor who allegedly harassed O'Brien because of O'Brien's sexual orientation and ethnicity.

Rachel Eskoff worked in the hotel's sales department and, during the relevant time period, she worked under plaintiff Dupree. Dupree claimed that Eskoff received favorable treatment from the hotel's management because of her sexual relationship with del Hoyo and that he was unlawfully terminated by management as a result of that relationship.

PROCEDURAL BACKGROUND

In the operative third amended complaint, plaintiffs asserted the following claims: in the first cause of action, plaintiffs O'Brien and Dupree asserted FEHA claims for discrimination against defendant Sajahtera, Inc.; in the second cause of action, plaintiffs O'Brien and Dupree asserted FEHA claims for harassment against defendants del Hoyo and Sajahtera, Inc.; in the third cause of action, plaintiffs O'Brien and Dupree asserted FEHA claims for failure to prevent discrimination and harassment against defendant Sajahtera, Inc.; in the fourth cause of action, plaintiff Dupree asserted a claim for wrongful termination in violation of public policy against defendant Sajahtera, Inc.; in the sixth cause of action, plaintiff Giron asserted a claim for sexual battery in violation of Civil Code section 1708.5 against defendants del Hoyo and Sajahtera, Inc.

In November 2013, plaintiffs filed their first motion for a terminating or other sanction. Defendants opposed the motion and plaintiff filed a reply. Following a hearing and further submissions by the parties, the trial court denied the motion.

Former coplaintiff Robert Sulatycky appealed from the trial court's order granting summary judgment against him and the court's order denying plaintiffs' terminating sanctions motion. In November 2015, we issued a nonpublished opinion in *Sulatycky v. Sajahtera, Inc*., case number B256972, that affirmed, inter alia, the trial court's order denying the terminating sanctions motion.

While Sulatycky's appeal was pending, the case proceeded to a jury trial on plaintiffs' claims. In August 2014, the jury returned defense verdicts on each of the claims asserted by plaintiffs.

In September 2014, plaintiffs filed a renewed motion for a terminating or other sanction pursuant to Code of Civil Procedure section 1008, subdivision (b), arguing that new evidence of spoliation that came out at trial, when viewed together with the evidence in support of their original motion for terminating sanctions, warranted a terminating or other sanction. Defendants opposed the motion and plaintiffs filed a reply. Following a hearing on the renewed motion, the trial court denied it on September 26, 2014.

The trial court entered a judgment in favor of defendants on October 3, 2014. On October 15, 2014, defendants filed a memorandum of costs that plaintiffs moved to tax. Following supplemental briefing, the trial court granted the motion in part, denied it in part, and ordered defendants to file an amended memorandum of costs. In response to the trial court's order, Defendants filed an amended memorandum of costs, and, based thereon, the trial court inserted in the judgment a joint and several cost award of $135,329.13.

In November 2014, plaintiffs filed a motion for new trial, arguing that their evidence of spoliation in support of their renewed terminating sanctions motion warranted a new trial. Following briefing and a hearing, the trial court denied the new trial motion.

DISCUSSION

A. Exclusion of Fischer Report

1. Background [4]

a. Fischer report

Following the filing of plaintiff's complaint, the hotel engaged an employment attorney, Fischer, to investigate the allegations in the complaint. Fischer interviewed witnesses and reviewed thousands of e-mails and other documents. The investigation was completed in approximately two weeks and resulted in the Fischer report, a 23-page letter that was submitted to the hotel's management.

During discovery, the hotel produced the Fischer report to plaintiffs. The report detailed Fischer's findings and recommendations based on his investigation of the allegations in plaintiffs' complaint and plaintiffs' claim of document destruction. Among other things, Fischer concluded that three hotel executives—White, director of human resources, Janet Jacobs, director of finance, and Darlene Adams, director of sales—"intentionally moved large portions of their e-mail record onto their hard drives or company-purchased digital storage devices so that their e-mail correspondence could not be viewed . . . ." According to Fischer, "[a]fter an extensive analysis of this e-mail record, it [was] clear that there was still a great deal of correspondence that ha[d] still not been discovered."

During his deposition, Fischer was questioned about his report, and he confirmed the following concerning document destruction: The hotel's new general manager, Mady, asked Fischer to investigate the allegations in plaintiffs' complaint. During the course of his investigation, Fischer interviewed 30 to 40 people. Because Fischer

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[4] Portions of this background section are taken from our unpublished opinion in *Sulatycky v. Sajahtera, Inc.*, case number B256972. At hotel's request, we take judicial notice of that opinion, as well as the documents filed in the record of that appeal.

believed White may have destroyed evidence, he attempted to obtain video footage showing White at the hotel during the Memorial Day weekend, but was informed by the hotel's director of security that "we just don't have it."

Fischer confirmed that two hotel employees observed Jacobs shredding a large number of documents during the 2011 Memorial Day weekend. When Fischer asked Jacobs if she had shredded documents around that time, she initially denied it, but later modified her response by stating that she routinely shredded documents in the ordinary course of business.[5] Fischer believed that Jacobs was lying to him and that she was aware of plaintiffs' lawsuit by the time of the Memorial Day weekend.

b. Motion in limine

Prior to trial, defendants filed a motion in limine seeking to exclude the Fischer report in its entirety. According to defendants, the report contained inadmissible hearsay, improper legal conclusions, and was unduly prejudicial under Evidence Code section 352. Plaintiffs opposed the motion, arguing that the report was admissible under certain exceptions to the hearsay rule and was not more prejudicial than probative.

After hearing argument on the motion in limine, the trial court concluded that the report contained multiple hearsay statements not attributable to any identified witness or witnesses and contained improper opinions and conclusions, without proper foundation, "which [would] invade[ ] the province of the jury." The trial court, however, also advised plaintiffs that they could seek permission to use portions of the report with proper foundation or if defendants put it in issue. As the trial court explained: "Having said that, aspects of the report may or may not be utilized if a foundation is laid. For example, plaintiffs' [sic] say it contains consistent and/or inconsistent statements; however,

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[5] In his investigative report, Fischer explained that after plaintiff's lawsuit was filed, "Jacobs sent an e-mail claiming that no records had been destroyed. However, when confronted with witness testimony that she indeed had been shredding information, . . . Jacobs modified her testimony to say that she shreds material 'all the time' as part of her job. Witness testimony in the [h]otel's finance department [did] not support her claims."

plaintiffs fail to indicate what those statements are so that the court knows which are consistent or inconsistent. Further, there may be admissions within the report. However, what is not established on this record is who made the statements. As Mr. Fisher is simply a collector of information, the court does not know who made what statements, when and in conjunction to what question and at what time. [¶] In other words, upon suitable foundation, aspects of the report may or may not be utilized. However, on this record, the report is inadmissible and the motion in limine should be granted. [¶] Should Mr. Fisher testify, . . . or should the defendants put the existence of the report and/or its contents in issue in some fashion, plaintiffs can ask, at side bar, for permission to utilize portions of it. [¶] However, as this motion seeks to foreclose [in] its entirety the admissibility of the report, and there does not appear to be any suitable exceptions of the hearsay and opinion rules, the motion should be granted."

c. Cross-examinations relating to Fischer report

Notwithstanding the trial court's ruling excluding the Fischer report, plaintiffs were allowed during trial to question several of the hotel's witnesses regarding Fischer, his investigation, and the witnesses' statements to Fischer contained in his report. As explained below, plaintiffs cross-examined a dozen witnesses in this manner.

i. Mady

Based on the Fischer report, plaintiffs questioned Mady extensively regarding: the timing of Fischer's investigation and the suspensions of White, Jacobs, and Adams; defendants' efforts to preserve evidence as a result of the Fischer report; whether he gave any weight to Fischer's conclusions in making certain decisions regarding the hotel's management personnel; Fischer's submission of the report of his findings; his review of the findings of the Fischer report with his supervisor, Cowdray, and Fischer; whether he considered the report in terminating certain employees; his meeting with Paloff; the decision to terminate Paloff based on the investigation's findings; and his termination of White because he wanted to put his own leadership team together.

ii. Fischer

Fischer's videotaped deposition testimony was played for the jury. He was questioned about: Mady asking him to investigate the allegations made in plaintiffs' complaint; the report he prepared containing his findings; his labor and employment experience and the work he performed on the investigation; documents relating to del Hoyo's attendance at sexual harassment training; and his interrogation of Jacobs concerning whether she shredded documents.

iii. White and Adams

Plaintiffs questioned White concerning a statement she prepared at Fischer's request, which included details about the allegations of misconduct against del Hoyo and findings that his behavior was inappropriate. She was also questioned concerning her statement to Fischer that she shredded documents every day. Adams was shown and questioned about a statement in Fischer's report made by Helen Smith during Fischer's interview of her concerning Smith's recommendation of plaintiff Dupree over Eskoff for the position of director of sales.

iv. del Hoyo

Plaintiffs questioned del Hoyo concerning his understanding of the purpose of Fischer's investigation. He was also asked whether he agreed with Fischer's conclusion in the report that his conduct as general manager of the hotel fell below the standards of the Dorchester Collection.

v. Other Employees

Plaintiffs also questioned: Eskoff concerning the statement she gave to Fischer; Antwan Nivens about a statement he gave to Fischer concerning his observation of Jacobs shredding documents; Jason Prost about a document he prepared and submitted to Fischer during the investigation concerning, inter alia, plaintiff Dupree's competence as director of sales; Schnee concerning her meeting with Fischer and her understanding of

the purpose of Fischer's investigation; Paloff regarding his participation in Fischer's investigation; Pepe De Anda about Fischer's interview of him concerning, inter alia, De Ande's statement describing an April Fool's prank that Paloff played on plaintiff O'Brien; and Aileen Abe about the statement she prepared and submitted to Fischer during his the investigation concerning, inter alia, del Hoyo's use of racial slurs and his touching of women.

2. Standard of Review

Plaintiffs' challenge to the trial court's order excluding, on the grounds of hearsay and opinion, the Fischer report is reviewed for abuse of discretion. "[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion. Specifically, it scrutinizes a decision on a motion to bar the introduction of evidence as inadmissible hearsay for such abuse: it does so because it so examines the underlying determination whether the evidence was indeed hearsay. (*People v. Rowland* [(1992)] 4 Cal. 4th [238,] 262-264.) It follows that it gives the same level of scrutiny for the same reason to the passing on a hearsay objection." (*People v. Alvarez* (1996) 14 Cal.4th 155, 203.) Similarly, a trial court's ruling excluding lay opinion as based on speculation is reviewed for abuse of discretion. (*People v. Thornton* (2007) 41 Cal.4th 391, 429.)

"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. [Citations.]" (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

3. Analysis

Plaintiffs contend that the trial court abused its discretion when it excluded the Fischer report in its entirety on the grounds of hearsay and opinion. According to plaintiffs, the report was admissible under the following exceptions to the hearsay rule: the report was an admission of Fischer as an authorized agent of the hotel; the hotel

adopted the report by acting on its findings; and the report was admissible, not for the truth of the matter asserted therein, but because it explained why the hotel took certain actions in response to its contents. Plaintiffs also contend that the report was not impermissible opinion because Fischer could have qualified as an expert, his opinions were based on the firsthand knowledge of the witnesses he interviewed, and any impermissible opinions could have been redacted.

Based on our review of the Fischer report, we conclude that the trial court did not abuse its discretion by excluding it in its entirety and instead granting plaintiffs leave to introduce portions of it upon a proper foundational showing. As the trial court observed, the report was rife with hearsay statements from unidentified witnesses such as, for example, the statement in the report's introduction in which Fischer concludes that "[w]itnesses describe[d] how [d]el Hoyo created a rift between the [h]otel and Dorchester Collection . . . ." The report also contained the impermissible conclusions of Fischer—who was not called to testify as an expert—that lacked foundation and did not otherwise qualify as admissible lay opinion under Evidence Code section 800,[6] such as, for example, Fischer's conclusion that Jacobs was lying about routinely shredding documents. Therefore, it was not beyond the bounds of reason for the trial court to exclude the report at the outset of trial on the understanding that portions of the report could be offered for admission during trial with an appropriate foundational showing.

Moreover, even assuming, arguendo, that some or all of the report should have been admitted under certain exceptions to the hearsay rule and that Fischer's opinions could have qualified for admission under Evidence Code section 800, plaintiffs were not prejudiced by the exclusion order. First, they do not contend or suggest that they attempted to lay a foundation for the admission of portions of the report, as the trial court

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6 Evidence Code section 800 provides: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony."

had authorized them to do. Second, the trial court gave plaintiffs significant latitude to reference the report and its contents during cross-examination of a dozen hotel witnesses, such as, for example, during the cross-examination of Mady. Indeed, plaintiffs do not point to any question relating to the report that they were prevented from asking.

Based on the trial court's rulings, the jury was aware of the existence and purpose of the report, including many of its conclusions, and in light of the evidence relating to the report that was admitted, plaintiffs have failed to demonstrate the requisite prejudice, i.e., that it is reasonably probable that a result more favorable to them would have been reached in the absence of the error. (Code Civ. Proc., § 475 ["No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial . . . ."]; *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337 [an appellant bears the burden of establishing prejudice by spelling out in his or her brief exactly how an alleged error caused a miscarriage of justice]; *People v. Richardsen* (2008) 43 Cal.4th 959, 1001 ["It is . . . well settled that the erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice. [Citations.] '[A] "miscarriage of justice" should be declared only when the court, "after examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]"].)

B. Renewal Motion

1. Background

As set forth above, prior to trial, plaintiffs made a motion for a terminating or other sanction based on the hotel's alleged spoliation of evidence immediately after being apprised of plaintiffs' claims. After briefing, argument, supplemental briefing, and further document production and review, the trial court denied the motion. Although the trial court remarked during oral argument that it was "persuaded that, in fact, certain

documents were destroyed," the court questioned whether plaintiffs had demonstrated that those documents were relevant to plaintiffs' case. In addition, after reviewing the further briefing and the 12,000 documents that had been recovered by the hotel's expert, the trial court in its minute order denying the motion found that none of those recovered documents "was relevant or would reasonably be calculated to lead to the discovery of admissible evidence."

Notwithstanding the trial court's ruling denying plaintiffs' terminating sanctions motion, the trial court[7] allowed plaintiffs to question numerous witnesses about the spoliation issue and to address and argue the issue during opening and closing statement. For example, during opening statement, plaintiffs' counsel explained their spoliation theory to the jury as follows: "[The hotel] also destroyed evidence. We're going to talk about that as well. And some of this is going to be difficult to explain. 'Spoliation' just simply means the destruction of evidence. It's a term we use in the law. And within days of being aware of this lawsuit, officers of [the hotel], key people, began deleting large amounts of e-mails, computer files - - the evidence is going to show this - - and shredding paper documents, all right? And we're not going to know, the evidence is going to show, exactly what was lost because they threw away the shredded documents and defragmented their computers. [¶] So the evidence is going to show key parts about this - - we don't have a full record here; so what that means ultimately is that you can't trust their evidence. If you cherry-pick and only leave the good stuff in your evidence, [that] means you can't trust [the hotel's] evidence. You can't trust the hotel's evidence they present. We may assume that [the h]otel destroyed damaging evidence, favorable to plaintiffs, all right?"

Plaintiffs' counsel also argued the spoliation theory during closing argument. "And the reason why this is so problematic is destroying documents thwarts a just and fair trial. It's impossible to have a fair trial when a defendant destroys documents. It's

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[7] Judge Recana denied plaintiffs' terminating sanction motion prior to trial. Judge Czuleger, however, presided over the trial and denied the posttrial renewed terminating sanctions motion.

impossible to determine what happened and why. It thwarts the entire process. It destroys the fairness of this very trial when documents are destroyed. [¶] . . . [¶] Now, why is this all important? Because there's a jury instruction that the judge will read to you shortly after our closing arguments. And what this says is when one party conceals or destroys evidence, you may decide that evidence would have been unfavorable to that party. In other words, all by itself, the hotel's destruction of evidence justifies a vote in favor of the claims of Mr. Dupree, Mr. O'Brien and Ms. Giron. All by itself. [¶] [You should i]nfer that the evidence was bad, that's why they destroyed it; and, in fact, the failure to show these documents means they don't have them, they were destroyed."

In addition, at plaintiffs' request and over the hotel's objection, the trial court instructed the jury with CACI No. 204 as follows: "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party."

Approximately one month after the jury returned its verdict in favor of defendants, plaintiffs filed a renewed motion for terminating sanctions pursuant to Code of Civil Procedure section 1008, subdivision (b).[8] Plaintiffs based their motion on what they characterized as "new" evidence of spoliation that they elicited at trial.

After considering the parties' briefing and arguments, the trial court denied the motion, reasoning as follows: "Turning lastly to the [p]laintiffs' [m]otion for [t]erminating and [e]videntiary [s]anctions. In a sharply worded [m]otion, [p]laintiff[s] renew[ ] multiple earlier requests regarding the spoliation of evidence. The issue was heard and resolved not to [p]laintiffs' satisfaction prior to trial by Judge Recana. [¶] Judge Recana took appropriate action then and this [c]ourt sees no reason to disturb those

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[8] Code of Civil Procedure section 1008, subdivision (b) provides in pertinent part: "A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown."

earlier rulings. Parenthetically, there has not been sufficient compliance with the rules concerning [m]otions for [r]econsideration. [¶] More importantly, over [d]efendants' strong objections, this [c]ourt did allow extensive evidence of [p]laintiff's [sic] theory of spoliation to be presented to the jury at trial. [¶] Furthermore, over [d]efense objections, the jury was instructed on wilful [sic] suppression of evidence. So in a sense, [p]laintiff has already received part of that which they now seek in this [m]otion during trial. [¶] In any case, the jury was given the benefit of this evidence and either chose to disregard it, did not find it to be true or [determined it] was of no consequence to them in reaching their verdict. [¶] Terminating and issue sanctions are extreme measures and simply not warranted under both the facts and the law of this case. This [m]otion therefore, should be denied."

2. Standard of Review

A trial court's ruling on a motion for a terminating sanction, like its rulings on other sanction motions, is reviewed for an abuse of discretion. "'Discovery sanctions "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." [Citations.]"' The trial court has a wide discretion in granting discovery and . . . is granted broad discretionary powers to enforce its orders but its powers are not unlimited. . . . [¶] The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment. [Citations.]'" [Citations.]' (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487-488 [282 Cal.Rptr. 530]; accord, *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35 [9 Cal.Rptr.2d 396].) '"The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action. [Citations.] Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a

failure to comply . . . and (2) the failure must be willful [citation]." [Citation.]' (7 Cal.App.4th at p. 36.)" (*Vallibona v. Springer* (1996) 43 Cal.App.4th 1525, 1545.)

3. Analysis

Plaintiffs contend that the trial court abused its discretion when it denied their posttrial renewed motion for a terminating sanction. According to plaintiffs, their trial evidence concerning spoliation, when combined with their original evidence in support of their pretrial terminating sanction motion, warranted an order terminating the action in their favor.

In a footnote, defendants argue that our opinion affirming the original order denying plaintiffs' terminating sanction motion is either law of the case or collateral estoppel that bars plaintiffs' renewed motion. In their reply, plaintiffs argue that neither the law of the case doctrine nor collateral estoppel bar their renewed motion because our opinion affirming the denial of the original sanction motion did not involve the same parties, i.e., only former coplaintiff Sulatycky was a party to that appeal, citing *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491 [law of the case requires a prior determination of the same issue between the same parties] and *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 [res judicata requires a relitigation of the same cause of action between the same parties].

We do not need to determine defendants' contentions based on law of the case and collateral estoppel. Even if we assume that those two doctrines do not apply—because, for example, the issue determined in the renewed sanction motion, which was based on purportedly new facts, was different than the issue determined in the original motion—plaintiffs have failed to demonstrate an abuse of discretion. In determining the original sanction motion, Judge Recana reviewed and considered many of the same facts that supported the renewed motion and concluded that plaintiffs had failed to prove that documents and data relevant to their case had been destroyed. Thereafter, plaintiffs presented and argued their spoliation evidence to the jury, including the evidence that they characterize as "new." The jury also was instructed that, if the jury determined

relevant evidence was willfully destroyed, it could presume that the evidence was unfavorable to defendants. Notwithstanding plaintiffs' spoliation trial evidence and argument based thereon and the trial court's instruction, the jury found unanimously in favor of defendants, a verdict that suggests that the jury was not persuaded by plaintiffs' evidence of spoliation.

The trial court heard all of plaintiffs' spoliation evidence during trial and considered it anew in connection with the posttrial renewed motion. It concluded, in light of Judge Recana's prior ruling, that plaintiffs had not presented anything in support of their motion that warranted a different result on the spoliation issue. For example, plaintiffs contend that, in a declaration in support of their original terminating sanction motion, the hotel's computer expert represented that the hotel "had recovered from a server all of the electronic documents that had allegedly been destroyed," but then admitted during his trial testimony that he was unable to recover "some" of the deleted files. But, a fair reading of the expert's declaration and trial testimony shows that, although the expert in his declaration stated that the majority of certain types of files were recoverable, he nevertheless conceded that at least some deleted files could not recovered, and he testified similarly at trial that "some files" could not be recovered. It was therefore not unreasonable for the trial court to construe the expert's testimony and conclude there was nothing about the expert's trial testimony that warranted a different outcome on the renewed sanctions motion.

Given the record on the renewed motion, including Judge Recana's ruling and the jury's verdict, the trial court's ruling on that motion was not beyond the bounds of reason. In essence, plaintiffs are urging us to reweigh the evidence upon which Judge Recana ruled, as well as the trial evidence on spoliation, and to draw more favorable inferences from that evidence. Under the abuse of discretion standard of review, however, when two or more inferences can reasonably be deduced from the facts, we have no authority to substitute our decision for that of the trial court. (*Shamblin v. Brattain*, *supra*, 44 Cal.3d at pp. 478-479.) We therefore conclude that the trial court's

ruling, which was consistent with Judge Recana's prior ruling and the verdict of the jury, was not beyond the bounds of reason.

C. Costs

Citing to our Supreme Court's recent decision in *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97 (*Williams*), plaintiffs contend that the joint and several cost award against them must be reversed because, under that decision, prevailing defendants in a FEHA action are not entitled to recover their costs under Government Code section 12965, subdivision (b),[9] absent a finding that the plaintiff prosecuted the action in bad faith, frivolously, or maliciously. According to plaintiffs, because the trial court found, in connection with the denial of defendants' motion for attorney fees under FEHA, that plaintiffs' lawsuit was based on some evidence, had achieved some of its remedial objectives, and was not objectively groundless, ~(RT 6906-6908, 6914)~ there was no legal basis under FEHA for the cost award.

Defendants concede that, under *Williams, supra*, 61 Cal.4th 97, the cost award against plaintiffs Dupree and O'Brien should be reversed because they asserted FEHA claims that the trial court determined were not frivolous. Defendants contend, however, that the award against plaintiff Giron should be affirmed because her single cause of action for sexual battery did not arise under FEHA, but rather under the Civil Code. Therefore, defendants argue that the FEHA policy rationale underlying the *Williams* decision does not apply to the cost award against Giron and that the costs against her were authorized under Code of Civil Procedure section 1032.[10]

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[9] Government Code section 12965, subdivision (b) provides, in pertinent part: "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs, including expert witness fees."

[10] Code of Civil Procedure section 1032, subdivision (b) provides: "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding."

In their reply brief, plaintiffs argue that the cost award against Giron should also be reversed because her sexual battery claim was "intertwined" with the nonfrivolous FEHA claims of her coplaintiffs, citing *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040 (*Roman*). In the alternative, plaintiffs contend that the cost award against Giron should be remanded to the trial court to determine (i) whether any of the cost items claimed by defendants were attributable exclusively to Giron's sexual battery claim and, if so, (ii) the reasonable amount of such costs to award against Giron.

We agree with plaintiffs that the cost award against Giron should be reversed and remanded for further consideration. Under *Roman*, *supra*, 237 Cal.App.4th 1040, if a FEHA claim was not frivolous, only those costs properly allocated to non-FEHA claims may be recovered by a prevailing defendant. (*Id.* at p. 1062.) Therefore, if Giron's sexual battery claim caused defendants to incur specific costs allocable to that claim, the reasonable amount of such costs would be recoverable. But, if costs were incurred by defendants in defending against the sexual battery claim that were intertwined with the costs incurred in defending the nonfrivolous FEHA claims of her coplaintiffs, such costs would not be recoverable. (*Id.* at pp. 1059-1060.) Therefore, the cost award against Giron must be reconsidered by the trial court to determine which cost items, if any, were attributable exclusively to her sexual battery claim. (*Id.* at p. 1059, fn. 18.) If the trial court finds that one or more cost items are recoverable, it must also determine the reasonable cost of such item or items in light of Giron's personal financial circumstances. (*Id.* at pp. 1062-1063 [trial court has discretion to deny or reduce cost award to prevailing defendant when a large award would impose undue financial hardship on the plaintiff].)

DISPOSITION

The trial court's cost award against plaintiffs is reversed and the matter is remanded to the trial court for a determination of the amount, if any, of costs to award against plaintiff Giron. In all other respects, the judgment of the trial court is affirmed. No costs are awarded on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RAPHAEL, J. *

We concur:

TURNER, P.J.

KRIEGLER, J.

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.